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Supreme Court of the United States

OCTOBER TERM, 1954

No. 312

GRAYSON-ROBINSON STORES, INC.,
Appellant,

vs.

THE LIONEL CORPORATION,
Appellee.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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JUDICIAL PRINTING CO., INC., 82 Beekman St., N. Y.—BEekman 3-9084-5-6

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The principal purpose of this short answer to Appellee's Motion to Dismiss is to call the attention of the Court to the conflicts between the Record on Appeal and the statements of fact so confidently made in the Appellee's Motion. Not only are these statements unsupported by the Record;* many of them are flatly contradicted by the affidavit of Philip S. Harris, dated December 19, 1952, to which the Appellee declined to reply in the court of first instance despite ample opportunity to do so.

Specifically, Appellee's frequent use of "loss leader," "price bait" and similar emotionally charged terms, together with Appellee's criticism of the commercial prac-

* Pp. 2-17 of Appellee's nineteen-page Motion to Dismiss come almost verbatim from *A Fair Trade Manual for Management*, published by the American Fair Trade Council, Inc. in 1950 (pp. 4-10, 19, 20, 24, 27, 28, 32, 38). From a more neutral viewpoint, the necessity and advantages of "fair trade" appear considerably less obvious. E. g., Corey, *Fair Trade Pricing: A Reappraisal*, 30 Harv. Bus. Rev. 47 (1952); Fulda, *Resale Price Maintenance*, 21 Univ. Chic. L. Rev. 174 (1954); editorial, "Philosophy of Compulsion," *The Wall Street Journal*, Sept. 27, 1954, p. 8.

tices they purport to describe, are simply irrelevant here. The Harris affidavit, standing unchallenged on the Record, states clearly that Appellant did not use Appellee's toy electric trains as "loss leaders":

> "Despite the rather substantial reductions below the plaintiff's [appellee's] retail list prices charged at the S. Klein store, we make a satisfactory profit on every sale. We have found it to be invariably true that the mark-up reflected in so-called 'fair trade' prices is more than we need or want to charge." (Harris affidavit, p. 3.)

The reason for this is the well-known policy of the "cash-and-carry" S. Klein stores to "operate on the basis of low costs, low profits and low prices." (Harris affidavit, p. 2.)

Mr. Harris's affidavit, based on his long experience in retailing, also demonstrates that the retail customer does *not* relate the goodwill of a manufacturer in its trade-mark or brand name to non-competitive, fixed prices. (Harris affidavit, pp. 8-10.) This, too, is undisputed by any evidence adduced on the Appellee's behalf, although the Appellee's Motion to Dismiss appears to assume that the contrary has been established.

In the course of summarizing our Statement as to Jurisdiction, the Appellee charges us with having raised "a frivolous point, to wit, that the McGuire Act . . . is unconstitutional." (Motion to Dismiss, p. 2.) Of course, no such point is directly raised on this appeal.* We did, however, present a separate question concerning the validity of the New Jersey Fair Trade Act under the commerce clause (Statement as to Jurisdiction, p. 3) and we note here that, while Appellee's Motion to Dismiss attempts to deal with the due process question, it apparently fails to recognize the commerce clause question and consequently virtually ignores it.

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*Cf. the Petition for a Writ of Certiorari in *S. Klein On The Square, Inc.* v. *The Lionel Corporation*, No. 327, this term.

The public importance of the basic issues here, and the consequent need for a definitive resolution of them by this Court, continue to grow. We note, for example, that a trial court in Utah has just declared that State's "fair trade" law invalid under the Utah constitution, thus adding another jurisdiction to the list of those which expressly or by necessary implication question the current validity of this Court's views in the *Old Dearborn* case of 1936. *General Electric Co.* v. *Thrifty Sales, Inc.*, Civ. No. 102665, 3rd Jud. Dist. Ct., Salt Lake Co., Utah, Sept. 24, 1954 (not yet reported). Further indications of widespread interest in the subject appear frequently in the press (e. g., *The Wall Street Journal*, Sept. 23, 1954, pp. 1, 11). The present-day status of State "fair trade" laws under the Federal constitution is a persistent question which requires plenary consideration by this Court.

CONCLUSION

The Appellee has failed to establish that the questions presented are not substantial. The Motion to Dismiss should be denied, probable jurisdiction noted, and the cause set down for argument.

Respectfully submitted,

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Dated: New York City,
September 30, 1954.